

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

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3 SHULAMITH SCHOOL FOR GIRLS, 19-CV-3152 (MKB)
4 Plaintiff, United States Courthouse
5 - versus - Brooklyn, New York

6 May 28, 2019
5:00 p.m.

7 MARYELLEN ELIA, COMMISSIONER
8 OF EDUCATION, and THE STATE
OF NEW YORK,

9 Defendants.

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10 TRANSCRIPT OF CIVIL CAUSE FOR TEMPORARY RESTRAINING ORDER
11 BEFORE THE HONORABLE PAMELA K. CHEN
12 UNITED STATES DISTRICT JUDGE

13 APPEARANCES

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25 Proceedings recorded by mechanical stenography. Transcript
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LINDA D. DANELCZYK, RPR, CSR, CCR
Official Court Reporter

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1 (In open court.)

2 THE COURTROOM DEPUTY: Civil cause for TRO hearing,
3 Docket 19-CV-3152, Shulamith School for Girls versus MaryEllen
4 Elia, et al.

5 Will the party please state his appearance for the
6 record.

7 MR. KALBAN: Putney Twombly Hall & Kalban by Philip
8 Kalban.

9 THE COURT: Okay, have a seat.

10 You can remain seated during this proceeding, but
11 make sure you speak slowly and clearly into the microphone so
12 our court reporter can record you.

13 MR. KALBAN: Yes, Your Honor.

14 THE COURT: Just let's start off with a couple of
15 practice tips or pointers, which I'm sure you're aware of, but
16 when you're filing a 121-application, you should give us a
17 hard copy.

18 I don't know if you delivered one to the clerk's
19 office, but it appeared that we never got one and nor did
20 Judge Brodie.

21 MR. KALBAN: We were prepared to bring a hard copy
22 down but we were told by the clerk's office to file it
23 electronically. But I did bring an extra copy with me.

24 THE COURT: We'll take that, actually, and I'll give
25 that to Judge Brodie whose case this is.

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1 And the second thing, although you partially
2 answered that, it sounds like this is the first time you're
3 stepping foot in court today.

4 MR. KALBAN: It is.

5 THE COURT: Okay.

6 So ordinarily I suggest to you, especially when
7 you're talking about an event that is supposed to happen this
8 evening, that you should come to court and anticipate, if you
9 get what you want, that you get a prompt hearing or conference
10 so that no time is wasted.

11 MR. KALBAN: That was our intention, Your Honor,
12 but, unfortunately, I guess either they misunderstood us or
13 misinformation from the clerk's office saying file it
14 electronically, don't come down, they'll call us.

15 THE COURT: Fair enough.

16 In the future, I think you might want to call and
17 find out which judge got it and see what the judge wants you
18 to do. That's all fine. So I just want to make sure you know
19 for the future.

20 I've reviewed your application and I understand the
21 substantive basis of your argument in support of the request
22 for a TRO, and then perhaps a preliminary injunction, if
23 that's necessary.

24 The first question I want to ask you, though, is one
25 that's not addressed in the papers, and that has to do with

1 abstention.

2 So the logical first question for a federal court is
3 to say: Is this a matter we ought to be getting involved in,
4 and I'm sure you're aware of the doctrine of Burford,
5 B-U-R-F-O-R-D, abstention.

6 So my first question to you is: Why is this a
7 matter as to which the Court shouldn't exercise Burford
8 abstention, since this is something that's already pending and
9 is being heard right now in state court or, sorry, I misspoke,
10 state agency proceedings?

11 MR. KALBAN: Your Honor, that's because of the
12 constitutional question that it's raised that this is, in
13 essence, a dispute between two parties as to what the
14 appropriate religious belief is.

15 The Commissioner of Education has not ruled on that
16 issue, but had -- and I don't know who directed or why the
17 letter yesterday -- no, last Thursday came from an appeals
18 coordinator rather than the commissioner or even an attorney
19 in the counsel's office, but it purports to extend the stay to
20 an evening after school activity that's not an educational
21 activity.

22 And it's an unfortunate circumstance, but the parent
23 body has become aware because of something that one of the
24 children said in its school that they are unvaccinated
25 children, and it is a major concern because of what's going on

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1 in Brooklyn and Queens, which are right across the border from
2 where the school's located. And the only way to proceed would
3 be to get a court order.

4 The commissioner is not changing her position, or
5 the counsel's office is not changing its position with regard
6 to the admission of the child this evening.

7 THE COURT: Right. But I guess the fundamental
8 question, though, is this not a quintessential state matter
9 that that agency, or whatever other remedial pathways there
10 are for dealing with that within the state structure should
11 address rather than this Court.

12 So the question is whether or not any ruling from
13 this Court would be disruptive of state efforts to establish a
14 coherent policy with respect to a matter of substantial public
15 concern, and certainly immunization for school-age children
16 who are participating in the public school system, is a matter
17 of state concern.

18 MR. KALBAN: Absolutely, Your Honor.

19 THE COURT: Okay.

20 MR. KALBAN: And if it were not for the
21 constitutional issue, the church abstention doctrine, I would
22 agree with Your Honor. But because the church abstention
23 doctrine comes into play here, I think it is a federal
24 constitutional question.

25 And even when the highest court in the State of New

1 York has applied the church abstention doctrine, it has done
2 it based on the federal constitution.

3 So the U.S. Constitution of free establishment of
4 religion clause has been used -- has been cited both by
5 federal and state courts to say that a court cannot intervene,
6 cannot take any steps with regard to a dispute as to religious
7 beliefs.

8 And that's exactly what we have here where the
9 statute, the state statute says that a parent can seek a
10 religious exemption. The parent then submits a statement as
11 to why the parent's religious beliefs preclude them from
12 having their children vaccinated.

13 Typically a public school would rule -- would decide
14 on whether that is a sincerely held belief or not. But here
15 we have a yeshiva saying that it's a matter of Jewish law, and
16 we've cited the authorities, the rabbinical authorities that
17 say that every child must be vaccinated, and you may not admit
18 a child, and that is a religious belief.

19 So now we have the parent's purported religious
20 belief coming up against the school's religious belief.

21 Now, we've also cited it in our brief and shown that
22 this was, in essence, a cut-and-paste job by these parents
23 using the same lawyers and the same language verbatim as to
24 other letters sent to other schools. And it's becoming a
25 cottage industry of seeking religious exemptions.

1 But that is not the basis on which we come to this
2 Court. We come to this Court because it is a constitutional
3 question and we would ask this Court, as opposed to a New York
4 State court to rule that you cannot -- that the commissioner
5 cannot even hear this case because it is a violation of the
6 First Amendment's free exercise of religion law.

7 THE COURT: So you're saying any time there is a
8 religious exemption or some freedom religion issue that
9 relates to a state agency's area of governance, that a state
10 agency should not be allowed to decide that?

11 MR. KALBAN: No.

12 THE COURT: Okay. But that's what I hear you
13 saying.

14 In other words, I understand, and I agree with you,
15 that there's some cases that lend support to what you're
16 saying, which is where you have a constitutional question, the
17 federal courts, perhaps, or there's a greater argument that
18 Burford abstention should not be applied. I understand that.

19 But here you have a situation where the
20 constitutional question, namely religious freedom, whoever is
21 claiming it, whether it's the school or the student, is
22 embedded in a fundamental question of governance of the school
23 system that the Department of Education certainly has
24 responsibility for, right?

25 In other words, weighing whether or not a student

1 could be exempted from whatever the school requirement is,
2 vaccination, or perhaps studying on Saturday, or anything like
3 that.

4 The question I have for you is: Why, though, isn't
5 that still a matter for the state agency to decide how to
6 balance the constitutional right that's being asserted by the
7 student, and by the school, with what the state generally
8 requires for all other students who are not asserting that
9 religious exemption?

10 MR. KALBAN: Well, first the parents are not
11 asserting it's not a constitutional question with regard to
12 the parents, it's strictly a New York State statutory.

13 THE COURT: But why is it not? They're saying as a
14 matter of religion we don't want our child to have to be
15 vaccinated in order to go to school. They're claiming
16 basically the flip side of the religion exemption, if you
17 will, or argument that you're making.

18 MR. KALBAN: That comes into effect only, as here,
19 when it is a religious school on the other side.

20 There's a Florida case that we cited, *Flynn I*
21 believe it is, where the exact issue was before the court and
22 it had to do the Catholic school, but where the parents were
23 saying they want an exemption and the school was saying, no,
24 it is the Arch Diocese's belief that all children must be
25 vaccinated, and the court said it's a matter of constitutional

1 doctrine, the church abstention doctrine, we may not hear this
2 case.

3 THE COURT: But this is a -- you mean the state
4 court.

5 MR. KALBAN: Correct.

6 THE COURT: That they could not hear the case. Who
7 could not hear the case, the state court?

8 MR. KALBAN: The state court.

9 THE COURT: Because it would have to be decided by
10 the federal court.

11 MR. KALBAN: No, because it a constitutional
12 question. Because it is barred by the church abstention
13 doctrine from hearing the case. And I think that's what we
14 here.

15 And you don't have -- the parents certainly aren't
16 taking that position. And if it involves a private school
17 that's not a religious school, if it involves a public school,
18 that issue does not arise.

19 It does arise here, and might with the Catholic
20 school, where there is a religious belief on the school's part
21 that the children must be vaccinated.

22 And we've cited, you know, said chapter and verse
23 where the school's religious position comes from.

24 The petitioner has not cited where its position --
25 it cited some verses from various texts, but it doesn't show

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1 any religious leader or rabbi's support for their position.

2 THE COURT: But can I stop for a second, I'm sorry.
3 I'm confused about the case you cite, *Flynn*, which just as you
4 say stands for the proposition due to this ecclesiastical
5 abstention doctrine, courts shouldn't be getting involved in
6 what are essentially religious disputes, or disputes about
7 religious interpretation, right?

8 MR. KALBAN: Yes.

9 THE COURT: So how does that help you? That almost
10 suggests that this court should not get involved, doubly so if
11 you put aside even Burford abstention, but because courts
12 shouldn't get involved in divining what religions require.

13 MR. KALBAN: Because we are not asking you to divine
14 what the religious -- you know, who's right on the religious
15 positions.

16 All the Court has to see is that there are two
17 opposing religious-based positions --

18 THE COURT: Oh.

19 MR. KALBAN: -- and say it can't be heard.

20 And we said that to the commissioner, but the
21 commissioner, rather than saying you can't hear this case, has
22 now attempted to extend its order, its state order, which was
23 entered, I have to admit, we have not fully briefed the issue.

24 We raised the issue, we have not fully briefed the
25 abstention doctrine but is now attempting to extend it to an

1 evening program, and there's nothing in the state education
2 law that gives the commissioner any authority over an evening
3 program.

4 It's not an educational program, but we're not
5 asking -- again, we're not saying to this court, that's an
6 ancillary issue.

7 The prime issue is that these are two opposing
8 religious views, and the commissioner should be saying we
9 can't opine on it, therefore, we cannot enter a stay, and
10 that's why I'm asking this Court to tell the commissioner that
11 this is a constitutional issue where you cannot render an
12 opinion other than to dismiss the case. And --

13 THE COURT: But the only reason you're here in this
14 court is because you're asserting a religious freedom act
15 claim.

16 And for you to bring that, I have to acknowledge
17 that you're making some legitimate religious freedom act
18 argument that is part of your school's -- and even that raises
19 its own question -- but it's part of your school's religion
20 practice to require vaccinations of its student, correct?

21 And that's a legitimate religious freedom act claim.
22 That's the only way you get in front us, period.

23 Otherwise, I think what you're saying is that I
24 should rule that a state agency has no business acknowledging
25 or allowing any student who assert a religious freedom act

1 exemption from vaccination.

2 Because that's what's going on. The school's saying
3 yes for now we are allowing this student to assert this
4 exemption based on a quote/unquote sincerely-held religious
5 belief against vaccinations, and you're saying I should come
6 in and say the state agency, not a court, has no business
7 doing that.

8 Because you have your own religious freedom act
9 claim and, therefore, you're vying on who's right about what
10 Jewish -- the Jewish religion requires.

11 MR. KALBAN: No, because the Court can't even assess
12 what the Jewish religion requires.

13 THE COURT: Which court are you talking about, are
14 you talking about me?

15 MR. KALBAN: Yes. And I'm talking about the
16 commission.

17 THE COURT: But the commission is not a court, it's
18 a state agency --

19 MR. KALBAN: Correct.

20 THE COURT: -- whose executive function is to
21 administer the school system.

22 MR. KALBAN: Yes.

23 THE COURT: So this case, the Florida case you site,
24 doesn't stand for the proposition that a school district or
25 some educational body in the state has no right to grant

1 religious exemptions of their own regulations, namely the
2 immunization regulation.

3 MR. KALBAN: No, the child, through her parents,
4 certainly can apply for the exemption.

5 THE COURT: Which they did, and got.

6 MR. KALBAN: Which they did.

7 But if the religious school has a religious belief
8 that is contrary, and that -- by reason of that it rules that
9 the student may not attend in this instance, and that's what
10 occurred, then when the parent appeals to the commissioner,
11 the commissioner --

12 THE COURT: Has to bow out?

13 MR. KALBAN: The commissioner is bound by the
14 First Amendment just as any court is bound by the
15 First Amendment and has to say we cannot hear this appeal.

16 THE COURT: You know what's interesting is, I'll
17 tell you, I was actually more inclined to issue the TRO
18 because I thought the substance of what you were arguing was
19 to have this Court decide whether or not the religious
20 exemption that is being claimed is a legitimate one, or
21 whether or not, perhaps going further, the rights of the
22 school and their interpretation of what the religion requires
23 should prevail.

24 But what you're essentially arguing is that you want
25 this Court to basically say that the state agency has no

1 business adjudicating the school's challenge to the exercise
2 of religion claim being made by the student.

3 That's what you're saying. That once the school
4 decides to assert a Religious Freedom Act, or a religious
5 claim, a religiously-based claim, then the state agency has no
6 power.

7 That's what you're asking for. And that strikes me
8 as a very controversial proposition that I'm not sure you're
9 going to win on.

10 MR. KALBAN: If the judicial body determined that
11 the school's position was frivolous, then I think the judicial
12 body probably could go forward and hear the case.

13 But if it's determined that the school is
14 legitimately asserting, as in the *Flynn* case, a religious
15 belief, then I don't believe a court or a commissioner under
16 the First Amendment can proceed on that claim.

17 It has to dismiss it and say we are bound by the
18 First Amendment and the freedom of religion clause, and we
19 cannot determine this issue.

20 You want to go to a religious court, be our guest.

21 THE COURT: But I don't understand that. It seems
22 like your First Amendment door only swings one way; only if
23 they decide.

24 I mean it's a First Amendment Religious Freedom Act
25 claim to begin with because the student is asserting a

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1 First Amendment religious right not to get vaccinated, right?

2 The parents are saying: We want to be exempted from
3 your state regulation to vaccinate our child based on our
4 religion.

5 MR. KALBAN: No, I disagree, Your Honor, with all
6 due respect. It's based on a statutory exemption not on a
7 constitutional exemption.

8 The statute says that there are two -- that every
9 child must be vaccinated and lists ten different vaccines that
10 they must have, immunizations, and it says: However, if there
11 is a medical reason, if the vaccination is going itself is
12 going to cause medical injury to the child, that's one
13 exemption.

14 And there's a second exemption and the language is:
15 If there is a sincerely-held genuine religious belief against
16 vaccination --

17 THE COURT: Okay.

18 MR. KALBAN: -- and that's been used by Jehovah's
19 witnesses.

20 THE COURT: Christian Scientist.

21 MR. KALBAN: Christian Scientist.

22 And it's been used by Jews in public schools, in
23 Great Neck and other public schools, and it's been used in
24 yeshivas.

25 But I think this is probably the first time that a

1 yeshiva is coming forward and saying that we have studied this
2 issue, spoken to the rabbinical authorities, and as a matter
3 of Jewish law and Jewish beliefs, we may not admit your child
4 to the school.

5 So now we have a direct conflict between the
6 religious belief of the parent, and the religious belief of
7 the school. That has not arisen in New York previously. It
8 has arisen in Florida.

9 And in Florida, the court said First Amendment, we
10 can't hear this. I think the commissioner has to say the same
11 thing. But the commissioner hasn't.

12 And there's an event tonight, and it will raise all
13 kind of havoc, but that's why we're here to say if we can get
14 a restraining order for today and we go ahead and the Court
15 gets to hear the case fully, but it's our position that
16 because there are, let's say, two legitimate religious beliefs
17 meeting head to head, the commissioner is precluded, as a
18 matter of constitutional law, from addressing the issue.

19 And we're asking you to say let's have a hearing on
20 that and restrain the child from, in essence, allow the school
21 to prohibit the child from attending tonight.

22 THE COURT: Okay. But your position then is when,
23 there's only one side that's asserting a religious right, that
24 doesn't implicate this doctrine of courts having to stay out
25 of it.

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1 MR. KALBAN: That's correct.

2 THE COURT: But because it's a statutory provision
3 or because it's not or -- because it's still an assertion of a
4 religious right.

5 There's still a question of sincerely-held religious
6 belief embedded in that, right?

7 In other words, one of your arguments is that the
8 parents don't have a sincerely-held religious aversion to
9 immunization.

10 MR. KALBAN: Right. That's correct. That's one of
11 the arguments.

12 THE COURT: But so long as the situation remained as
13 such, and if the school had found that it wasn't sincere,
14 which is what you believe, you would say that -- I'm trying to
15 configure this appropriately -- but you would say that if the
16 parents wanted to appeal that decision, the school authority
17 would have the -- or the state court would have the ability to
18 adjudicate that.

19 MR. KALBAN: Yes.

20 THE COURT: Because it's only one religious belief
21 that's being asserted by one side.

22 MR. KALBAN: Correct.

23 THE COURT: But somehow when the school decides to
24 assert a contrary religious belief based on the same religion,
25 then the courts lose any ability to adjudicate that dispute.

1 MR. KALBAN: That's correct.

2 Because the school -- if the school has a legitimate
3 argument based on its religious belief and not something
4 that's made up, and there are a lot of cases on, you know,
5 what constitutes a sincerely-held religious belief. It can't
6 be something that's plucked out of thin air, it has to be
7 based on something.

8 And if the -- I think the same standard would apply
9 for the school. So if a school, without any basis, just said
10 we've got a religious belief against it, I don't think that
11 the constitutional prohibitions would apply.

12 I think, yes, there is an initial step for a court
13 to take, as the *Flynn* court did, to say this is a legitimately
14 held religious position on the part of the plaintiff and on
15 the part of the defendant, therefore, we cannot hear it.

16 But that would go to the next step before this Court
17 where there would be a hearing on a preliminary injunction
18 request.

19 THE COURT: Well, let me say this: I don't agree
20 with the Florida case you're citing in terms of this
21 ecclesiastical extension doctrine. I mean, you acknowledge
22 that hasn't been found to govern here in New York, and you're
23 obviously relying on a Florida state case.

24 To me the issue seems one of due process, if you
25 will, or some balancing of what the state government's right

1 is to make a determination about requirements for education
2 when balanced against the assertion of a constitutional right,
3 whether it's the school's or the student's.

4 I'm not sure that the school necessarily has a
5 constitutional right to assert, and that's something I haven't
6 really looked into, versus the individual.

7 Perhaps that's so -- well, it may well be so that
8 the school recognizes an entity that can have a sincerely-held
9 religious belief that guides how it runs its operations and
10 then might get countervailing force against what regulations
11 by the state it's required to accept.

12 Here it happens to be that the school's religious
13 beliefs align with the state's stated regulation requiring
14 vaccination, but it could just as easily be the opposite.

15 To me it's not a question about adjudicating what
16 the religion requires so much as what is the school allowed to
17 adjudicate in terms of the balancing of constitutional
18 assertions of religious rights and its primary authority to
19 run a school in a safe manner.

20 That seems to be more the issue. I don't think the
21 courts will exempt themselves or should be abstaining from
22 some adjudication of that question.

23 I'm not sure it involves them figuring out what the
24 religion requires so much as allowing -- determining the issue
25 of whether or not the state gets to be the authority; the DOE

1 gets to be the final word on that or not, and whether they did
2 that consistent with due process.

3 I think that's one of the fundamental questions than
4 adjudicating what the Jewish religious requires. Maybe that's
5 part of it, I'm not quite sure, since I haven't thought about
6 the final analysis.

7 But in terms of the question that you're raising, am
8 I correct that what you're saying is you want this Court to
9 rule that based on this ecclesiastical abstention doctrine
10 that the Department of Education for New York State has no
11 business and has no authority to decide whether the school's
12 religious beliefs trump the individual's religious beliefs
13 and, therefore, it doesn't have the authority to decide
14 whether to stay the denial of the religious exemption by the
15 school.

16 Because the school denied religious exemption
17 finding it wasn't sincerely held --

18 MR. KALBAN: Right.

19 THE COURT: -- and wanted the child to be excluded
20 until they got vaccinated.

21 MR. KALBAN: Correct.

22 THE COURT: The state stayed that denial, and you
23 want me to -- not me, Judge Brodie eventually -- to order the
24 state to stand down finding that they have no authority under
25 this abstention doctrine that you cite from Florida to

1 adjudicate religious beliefs, correct?

2 MR. KALBAN: That is correct.

3 But it's not just from Florida, we've cited New York
4 State cases as well.

5 The *Satmar* case and other cases that have the same
6 conclusion, just not directly relating to the vaccination
7 issue, but the state -- the Court of Appeals has held that it
8 can't adjudicate such disputes.

9 THE COURT: What was the context of the *Satmar* case?

10 MR. KALBAN: I having to go back and look, Your
11 Honor.

12 THE COURT: You're talking about the Congregation
13 Yetev Lev D'Satmar case, et al.

14 MR. KALBAN: Yes.

15 THE COURT: Okay.

16 So that case you say stands for the proposition that
17 the First Amendment prohibits the commissioner and the Court
18 from questioning or even examining the position of Shulamith,
19 your school, that under Jewish law it must require that all of
20 its student be vaccinated and refused to admit any child who
21 is not.

22 I'm look at your brief submitted to the
23 commissioner.

24 MR. KALBAN: Right.

25 THE COURT: I don't see a description of the case

1 itself.

2 MR. KALBAN: No. I did not grab a copy. I'm sorry,
3 Your Honor.

4 THE COURT: All right, so let's do this:

5 Here's what I'm prepared to do, and keeping in mind
6 that it's ultimately not going to be my case, but I have
7 consulted with the chambers of Judge Brodie who is not
8 available to hear this.

9 So first of all, the standard for issuing any kind
10 of preliminary injunction or temporary restraining order is
11 well established.

12 So the moving party here, Shulamith School for
13 Girls, because of this extraordinary relief that it is
14 seeking, must show either a likelihood of success on the
15 merits, or sufficiently serious questions going to the merits
16 to make them a fair ground for litigation with a balance of
17 hardships tipping decidedly in Shulamith's favor.

18 And, second, the likelihood of irreparable harm in
19 the absence of such an order.

20 And I'm citing from a decision that I issued couple
21 years ago *Patrick versus Success Academy Charter Schools*, and
22 it's a Westlaw reported decision, 2017, Westlaw 6557478, and
23 that's at page 3.

24 In turn, the *Patrick* case sites *In re Feit, F-E-I-T,*
25 & *Drexler, Inc.*, 760 F.2d 406 at 415, which is Second Circuit

1 case from 1985.

2 Now here I do find, albeit as I mentioned a moment
3 ago, I think the argument may have to be refined or adjusted a
4 bit, but I do find there is some sufficiently serious
5 questions raised on the merits of this matter, though I think
6 of them more as due process issues than anything else.

7 Regarding the decision by the school -- Education
8 Department, rather, to vacate or stay, I should say, the
9 denial of the religious exemption by Shulamith school, I do
10 note that where constitutional rights are being asserted, the
11 need to show irreparable harm is either absent or more de
12 minimis.

13 So that applies to this case because the second
14 aspect of the test is the likelihood of irreparable harm.

15 However, I also note that there has been some
16 suggestion about potential harm to the other students and the
17 family members in the Shulamith school with respect to the
18 event that is supposed to occur tonight.

19 The obvious question, of course, is why Shulamith
20 did not bring this TRO application earlier, but that's been
21 answered by the fact that the Department of Education only
22 announced its broadening of the stay to extracurricular
23 activities last Thursday, which was right before the Memorial
24 Day holiday.

25 So, therefore, it made it quite difficult for this

1 issue to be addressed further in advance of the actual event.

2 It does seem to me that since we are literally on
3 the day or the evening of the event, I should say, that it
4 would be difficult for Shulamith to do anything but, you know,
5 cancel the event or hastily advise all the parents and family
6 members and the children who are attending this event of the
7 circumstances; namely, that they are aware that there's one
8 student who may be attending or is likely to attend who has
9 not been vaccinated, which could, in turn, result in low
10 attendance or no attendance at an event that has been
11 represented to be a fund raiser, amongst other things, for the
12 school.

13 So I do find that that also would be a foundation
14 for a finding of irreparable harm in the absence of a TRO.
15 So, therefore, I also find that the balance of hardship does
16 tip in Shulamith's favor, perhaps because of numerosity, the
17 number of students and family members that would be affected
18 by not issuing a TRO against the individual student's right to
19 attend this extracurricular activity for tonight.

20 Couple questions do I have for you, though,
21 Mr. Kalban.

22 Is there a documented number of -- or are there a
23 documented number of measles cases in the area where the
24 school is located in Nassau County? I know there certainly is
25 in Brooklyn.

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1 MR. KALBAN: Brooklyn, and it's now in Queens as
2 well. And Queens is right on the border and it's significant.
3 And Far Rockaway, which is part of the area where the measles
4 seems to be spreading, is right next to the five towns where
5 this yeshiva is located in Cedarhurst.

6 THE COURT: So how close would you say Cedarhurst is
7 to an area of out break, if you know?

8 MR. KALBAN: Ten miles.

9 THE COURT: Okay.

10 And do you know if any of the student from this
11 school go to temple or otherwise have reason to go into any of
12 the affected areas?

13 MR. KALBAN: They certainly have friends in the
14 Brooklyn communities. Whether they are -- you know, there are
15 different neighborhoods in Brooklyn, but there are
16 certainly -- because of the spread of the measles epidemic,
17 there's concern that student have friends in Brooklyn and
18 Queens.

19 And certainly in Queens, like I said, it's just
20 across the border, Far Rockaway children come -- you know,
21 they come in contact with the five towns' children with some
22 degree of frequency.

23 THE COURT: Are there other events that the school
24 has planned after today?

25 MR. KALBAN: Not that I'm aware of, Your Honor.

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1 THE COURT: When does their school semester or year
2 end?

3 MR. KALBAN: I believe in the middle of June.

4 THE COURT: Okay, so that's a little over two weeks
5 from now.

6 So right now, though, as things stand, and actually,
7 you know, I'm not sure I focused on this.

8 The stay that you want me to issue as to the
9 Department of Education stay, you want that also to apply to
10 the student attending classes until the school year ends as
11 well; is that right? Or is it only as to this -- the
12 extracurricular event?

13 MR. KALBAN: Only to the extracurricular event, Your
14 Honor.

15 THE COURT: Because of the attendance of all family
16 members and pregnant women, et cetera.

17 MR. KALBAN: Correct.

18 THE COURT: So the order that -- the TRO that I will
19 issue, and I'll presumably use the proposed order and modify
20 it as necessary. But that will only apply to the most recent
21 order issued by the Department of Education -- or the
22 education commissioner staying the denial as to this student
23 for extracurricular activities.

24 MR. KALBAN: That's all we're seeking, Your Honor.

25 THE COURT: Okay, that's fine.

1 Otherwise this matter would be put over as
2 appropriate or deemed appropriate by Judge Brodie for further
3 proceedings. It may well be that nothing is necessary given
4 that the school year is about to conclude and there are no
5 other extracurricular activities on the horizon.

6 Let me make one other note for the record -- and,
7 obviously, this is just my ruling and Judge Brodie may have a
8 different view of this -- at this time I don't find that the
9 Burford abstention doctrine is significant enough of an issue
10 so as to bar potential relief in this case; again, that's
11 something that can be revisited by Judge Brodie.

12 With respect to that issue, the cases that I've
13 looked at are *Liberty Mutual Insurance versus Hurlbut*,
14 H-U-R-L-B-U-T, 585 F.3d 639, a Second Circuit case from 2009,
15 which I think sets forth the relevant Burford abstention
16 doctrine standards. Along with *Planned Parenthood of*
17 *Dutchess-ulster, Inc. versus Steinhaus*, S-T-E-I-N-H-A-U-S, 60
18 F.3d 122 at 127 to 129, 1995 Second Circuit case as well as.

19 In particular, I think the analysis in *Planned*
20 *Parenthood* is appropriate to this case.

21 There the Court focused on the fact that with
22 respect to the main criterion; namely, whether or not the
23 court's ruling would be disruptive, a state effort to
24 establish a coherent policy with respect to a matter of
25 substantial public concern, the court there found that the

1 granting of relief would not, and that the involvement of the
2 federal court would not do so.

3 There the court considered three things: Whether
4 the rules and regulations at issue were complex or not, so as
5 to weigh in favor of abstention.

6 And there the court found that they were not
7 sufficiently complex to the favor abstention.

8 I think what's appropriate is that here the
9 Department of Education is not ruling on any hard and fast
10 regulations so much as applying a general standard about
11 acknowledging or allowing religious exemptions based on some
12 assessment, I gather, of whether the religious belief is
13 sincere or not.

14 And I would contrast to something like a rate
15 setting, as often happens in the insurance industry, like the
16 *Liberty Mutual* case, or something like that.

17 Here it's a rather fluid and discretionary concept.
18 So I don't think it's complex or something that's uniquely
19 within the purview of state regulators.

20 The second prong that the *Planned Parenthood* court
21 considered whether the regulations contain broad other more
22 specific terms that require the expertise of state agencies or
23 experts in the field to interpret, here, as in *Planned*
24 *Parenthood*, I don't find that the regulations -- or rather I
25 find the regulations are very broadly worded for the reasons

1 that I've just said and don't require specific expertise of
2 state regulators; if anything, perhaps you need Talmudic
3 scholar, but not state regulators.

4 And the third factor is whether or not the subject
5 matter is of unique importance to the state.

6 As in *Planned Parenthood*, I think here one could
7 argue that it is an area within or of unique importance to the
8 state; namely regulating immunizations and other requirements,
9 health requirement for school attendance, but I don't think,
10 as the Second Circuit found in *Planned Parenthood*, it's enough
11 to outweigh the other two factors and to make this a matter
12 that's not appropriate for federal court review.

13 I'll also finally cite two other cases. This one
14 I'll definitely spell out *Hachamovitch*,
15 H-A-C-H-A-M-O-V-I-T-C-H, *versus DeBuono*, D-e-B-U-O-N-O, 159
16 F.3d 687, a Second Circuit case from 1998.

17 And then lastly, the case of *County of Suffolk*
18 *versus Long Island Lighting Company*. This is a Second Circuit
19 case from 1990, 907 F.2d 1295 at pages 1308 through 1309.

20 And here I think what's relevant from this case is
21 the Second Circuit's acknowledgment that the Supreme Court
22 says: The presence of a federal basis for jurisdiction may
23 raise the level of justification needed for abstention.

24 The fact that here, and they're talking about the
25 case below in that particular matter, the fact that here only

1 a federal claim was present raises a level justification even
2 more. And this goes to argument for the plaintiff.

3 Essentially what the Second Circuit found there is
4 that there's a heightened need where there's a federal
5 question, such as a constitutional claim presented, to guard
6 against abstention, otherwise abstention would become the rule
7 rather than the exception.

8 So even though I raise the arguments, the
9 counterarguments to the plaintiff having this case heard here,
10 I do believe that Burford abstention should not prevent the
11 case from going forward at this stage.

12 And I do think that there are substantial questions
13 raised by the complaint such that it's appropriate to issue
14 the TRO that's very limited in scope, both time-wise and
15 event-wise; and in terms of the impact on the would-be
16 opposing party.

17 Interestingly enough, I guess it would be the
18 Department of Education, but the party that would arguably be
19 harmed would be the one student who wouldn't get to attend.

20 So I find that the balance of equity does tip in the
21 favor of the school at this point in time given the limited
22 relief that's being sought.

23 So that's the ruling. I'll issue the order. I'll
24 advise Judge Brodie, of course, in more detail so that she can
25 make a decision about how to proceed hereafter. She may

1 require more information from the parties as to the ongoing
2 effect of this TRO. But the TRO will expire within 14 days.

3 So if there's some other need, I suspect to reapply
4 for an injunction that will last during the duration of the
5 case, the plaintiffs will do that as they deem appropriate --
6 the plaintiff will do that as it seems appropriate is what I
7 should have said.

8 Is there anything else that you wanted to raise,
9 Mr. Kalban?

10 MR. KALBAN: There is not, Your Honor.

11 I just want to thank you for your time in
12 accommodating me to get down here and be heard.

13 THE COURT: And sorry about the misdirection and the
14 unneeded tips. Your first instinct was the correct one.

15 All right, so you'll be hearing from Judge Brodie, I
16 imagine, with respect to scheduling of this, because she may
17 then direct the parties to go to discovery immediately.

18 I will attempt to explain to her what I think your
19 claim is, even though I view it as somewhat different, but you
20 may want to consider expanding the claim.

21 Maybe I'm wrong, but I'm not sure that your request
22 for an order telling the Department of Education that they
23 have no authority to decide this issue is the way to go.

24 I do think there's an interesting issue here about
25 an assertion of religious freedom rights -- I'm sorry, I kept

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1 referring to act. I just meant the constitution in general.
2 And that may be the issue that has to be resolved here.

3 However, I understand that your claim is that that's
4 an issue that courts don't have any business deciding either.

5 I'll let you figure that out with Judge Brodie. All
6 right.

7 So nice meeting you, Mr. Kalban.

8 MR. KALBAN: Thank you, Your Honor.

9

10

11 (Whereupon, the matter was concluded.)

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16 I certify that the foregoing is a correct transcript from the
17 record of proceedings in the above-entitled matter.

18 s/ Linda D. Danelczyk

June 24, 2019

19 LINDA D. DANELCZYK

DATE

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